RC Aluminum Industries, Inc., and RC Erectors, Inc. *and* Local Union No. 272 and Shopmen's Local Union No. 698 of the International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, AFL–CIO. Cases 12–CA–21207 and 12–CA–21453

December 8, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND MEISBURG

On May 14, 2002, Administrative Law Judge George Carson II issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs. The Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings,[1] and conclusions[2] as modified below and to adopt the recommended Order as modified.

We adopt the judge's conclusions that the Respondent violated the Act on several occasions following a Board election held July 21, 2000.[3] Specifically, as explained below, we agree with the judge that the Respondent discharged union supporter Alba Huembes in violation of Section 8(a)(3). We further agree with the judge that the Respondent unlawfully transferred union supporter Pedro Nunez to more onerous work, but we clarify the judge's make-whole remedy. In addition, we find that the Respondent threatened Nunez with unspecified reprisals on December 13 in violation of Section 8(a)(1).[4]

I. HUEMBES' ALLEGATIONS

The judge found that Supervisor of Production Armando Rodriguez unlawfully terminated active union supporter Alba Huembes on November 16. He rejected the Respondent's claim that Huembes was not fired, but quit, relying in part on a photocopy from Huembes' personnel file of one of her paychecks bearing the notation "Termination 11/16/00."[5] In exceptions, the Respondent again asserts that Huembes quit and argues that the paycheck document is inadmissible because it is hearsay and does not fall within the business records exception to the hearsay rule. See Fed.R.Evid. 803(6).[6] We find no merit in this exception.

[1] The Respondent has excepted to certain credibility findings made by the administrative law judge. Judge Jerry M. Hermele died after the hearing in the instant case had closed, but before the issuance of a decision. Thereafter, the case was reassigned to Judge Carson. The parties agreed to waive a hearing de novo and Judge Carson issued a decision based on the record before Judge Hermele. It is the Board's established policy to attach great weight to a judge's credibility findings insofar as they are based on demeanor. However, the Act commits to the Board itself the power and responsibility of determining the facts as revealed by a preponderance of the evidence, and the Board is not bound by the judge's findings of facts, but bases its findings on a de novo review of the entire record. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Judge Carson's credibility findings are necessarily based on factors other than demeanor, and, in consonance with the Board's policy set forth in *Standard Dry Wall Products*, supra, we have independently examined the record in this case. We find that there is no basis on the record in this proceeding for reversing his credibility determinations or his findings of fact based thereon.

[2] In adopting the judge's dismissal of the allegation that union supporter Roberto Espino was unlawfully denied access to his work area, we disavow the judge's suggestion that the party with the burden of persuasion on an issue necessarily fails to meet its burden when there is conflicting witness testimony that demeanor evidence fails to resolve. The Board has found that such one-on-one credibility contests may be resolved with reference to "the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole." *Daikichi Sushi,* 335 NLRB 622, 623 (2001) (internal quotation marks and citation omitted). Here, however, the General Counsel has failed to argue that any of these factors support the credibility of Espino's testimony, and so the General Counsel has not met his burden on the denial of access issue.

In adopting the judge's dismissal of the allegation that Espino was unlawfully discharged, we note that no party has excepted to the judge's conclusion that the General Counsel met his burden of showing unlawful motive. In any case, we agree with the judge that the Respondent showed that it would have discharged Espino even absent his union activity.

[3] The Union won the election. On November 9, 2000, the Regional Director certified the Union, but the Respondent subsequently refused to recognize and bargain with the Union. The Union filed charges and, in *RC Aluminum Industries,* 334 NLRB No. 64 (2001) (not reported in Board volumes), enfd. 326 F.3d 235 (D.C. Cir. 2003), the Board held that the Respondent had violated Sec. 8(a)(5) of the Act.

All dates refer to 2000.

[4] We adopt the judge's dismissal of multiple allegations of the complaint, for the reasons stated by him. No exceptions were filed to the judge's dismissal of the General Counsel's posthearing allegation that the Respondent's postelection grant of a wage increase violated Sec. 8(a)(3).

[5] The judge also discredited Rodriguez' testimony that Huembes quit. He further discredited the testimony of Leadman Jose Diaz, who was present for at least part of the conversation, that Huembes said she was leaving. The Respondent attacks the judge's credibility determinations. It argues that the judge erred because Diaz' testimony that Rodriguez did not fire Huembes "in [his] presence," and that Huembes stated that she was leaving, corroborates Rodriguez' testimony. We disagree. Because it is not clear whether Diaz was present for the entire discussion, his testimony that Rodriguez did not fire Huembes "in his presence" does not establish that Rodriguez did not fire Huembes. And even if Huembes did say that she was leaving, that would not necessarily establish that she quit.

[6] Rule 803 states: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (6) Records of regularly conducted activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmit-

We need not decide whether the document concededly from Huembes' personnel file falls within the exception to the hearsay rule, because we agree with the judge's conclusion that the document was admissible. See *Meyers Transport of New York,* 338 NLRB 958, 969 (2003) (hearsay is admissible if "rationally probative in force and if corroborated by something more than the slightest amount of other evidence" (citing cases)). We find that the "Termination" notation on the disputed document is corroborated by Huembes' testimony, which we credit for reasons explained below, and is, thus, admissible.[7]

We disagree with the dissent's assertion that, in the circumstances here, the use of the word "termination" does not tend to prove that Huembes was discharged, because it could reasonably be interpreted as referring to a voluntary separation from employment. Had Huembes quit, the word "quit" or some other term indicating voluntariness would likely have been written on the check, in order to make clear that Huembes was *not* discharged and, thus, that the Respondent was not exposed to potential liability (e.g., for unemployment compensation) in connection with her separation.

According to Huembes, Rodriguez stated during their November 16 conversation:

> [T]his is going to finish here already . . . because I already have your two checks being made. Because you are right here, you are uprising the people with the Union, [a]nd you know that with a Union or without a Union, I can fire people. . . [J]ust like I am firing you, I could fire anybody, because I don't believe in the Union.

Although the judge did not expressly credit Huembes, we find her testimony credible based on the inherent probabilities that support the judge's conclusion that Huembes was terminated. *Daikichi Sushi,* 335 NLRB at 623. Thus, the Respondent did not explain why Huembes ostensibly quit, and the circumstances do not suggest a reason. On the contrary, there is no evidence that she was dissatisfied with her work, and she had in fact recently asked the Respondent for a large loan.[8] Further, Rodriguez did not deny having made the statements Huembes attributed to him.[9] We, therefore, credit Huembes' testimony and find that Rodriguez' statement—"[j]ust like I am firing you, I could fire anybody"—corroborates the "Termination" notation on the disputed document.[10]

We conclude, like the judge, that the General Counsel has shown that Huembes was discharged and, thus, that the Respondent took adverse action against her.[11] Moreover, we agree with the judge that the General Counsel had met his initial burden of showing unlawful motive. Thus, according to Huembes' unrebutted testimony, Rodriguez stated that he was firing Huembes and could fire whomever he pleased because he did not believe in the Union. In addition, Rodriguez terminated Huembes immediately after learning that she had insulted another employee during a heated discussion of the Union.[12] He had also previously warned Huembes, unlawfully,

ted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness . . . unless the source of information or method or circumstances or preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

[7] The Respondent also argues that the document is inadmissible because it has not been properly authenticated under Fed.R.Evid. 901. We disagree. The General Counsel introduced the document into evidence as a document from Huembes' personnel file. Counsel for the Respondent conceded that the document was in fact from its personnel files. Thus, we find that the document was identified as being what its proponent claimed it to be, consistent with the requirements of Rule 901.

[8] Contrary to the dissent, we decline to speculate that Huembes quit voluntarily because she was "exasperated" by Rodriguez' treatment of her. There is, first, no evidence that Huembes was "exasperated," and, second, it is highly implausible, given her apparent need for income, that she would have quit.

[9] Rodriguez was not asked about the remarks attributed to him by Huembes and so did not specifically deny them. However, Rodriguez' testimony about his conversation with Huembes did not include the remarks.

[10] The General Counsel excepts to the judge's failure to find, based on Huembes' testimony, that Rodriguez unlawfully threatened employees with discharge. We agree. Rodriguez stated in the course of discharging Huembes that he would discharge whomever he pleased because he didn't believe in the Union. Rodriguez' statements would reasonably tend to interfere with Huembes' Sec. 7 rights. Moreover, if Diaz was present at the time, the statements would also reasonably have deterred him from Sec. 7 activity.

In this regard, Member Meisburg finds, for institutional reasons, that the Respondent violated Sec. 8(a)(1) by implying that union support was the reason for Huembes' discharge. Although he would find that the statement under scrutiny was part of the res gestae of the unlawful layoff and is subsumed by that violation, he recognizes that there is support for the finding of a violation. See *Benesight, Inc.,* 337 NLRB 282, 283–284 (2001).

Member Liebman adheres to precedent and finds that Rodriguez' statements clearly constitute a separate threat of unlawful discharge. Id.; see also *TKC,* a Joint Venture, 340 NLRB 923 fn. 2 (2003).

[11] A finding of adverse action is an element of the initial showing required under *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 445 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983).

[12] On November 16, the day of the discharge, Leadman Miguel Garzon reported to Rodriguez that Huembes had called him a "maricon" (translated from Spanish into English as "faggot") during a conversation about the Union. Rodriguez spoke with Huembes about the incident before terminating her.

against mentioning the Union.[13] Because the Respondent has offered no lawful explanation for the discharge, it has failed to rebut the General Counsel's showing of unlawful motivation.

II. NUNEZ' ALLEGATIONS

Like the judge, we find that Pedro Nunez was unlawfully transferred to more onerous duties after he wore his union pullover to work. The judge ordered a make whole remedy, which we clarify below.[14] The judge did not specifically address the allegation that Nunez was threatened with unspecified reprisals. We find that violation.

Nunez was one of the Respondent's most senior and capable drivers at its 2805 NW 75th Street facility, under the direction of Operations Manager Angel Portal. He was also the appointed union steward. On December 12, Portal directed Nunez to report the next day to the Respondent's Hialeah facility, which needed additional help for a couple of weeks. After Nunez arrived at Hialeah, Rodriguez told him that if he wanted to remain there, Rodriguez could teach him window assembly, but "he [Rodriguez] didn't want to know anything about the Union."[15] A day later, Nunez wore a union pullover to work. Rodriguez called Portal and stated that he no longer wanted Nunez working at Hialeah because "this gentleman had a union pullover on and . . . he [Rodriguez] didn't want to create any problems." Portal told Rodriguez to have Nunez report back to Portal.

Portal admitted that he asked Nunez, when Nunez reported back to him, why Nunez was wearing a union pullover. Portal then stated, according to the judge's findings, that he had a "little job" for Nunez and took Nunez over to the Respondent's 2600 NW 75th Street facility to break down glass boxes, a task requiring a crowbar. The judge found that the task was onerous and was generally performed by shipping employees and janitors, not drivers.[16]

The judge ordered an appropriate make-whole remedy for the unlawful transfer, including overtime pay. In his discussion, the judge suggested that the appropriate comparison for make-whole purposes would be the amount of overtime Nunez would have received "if he had continued to drive from his normal work location." But the judge concluded that Nunez' initial transfer from his normal location to Hialeah was not itself unlawful.[17] Thus, the appropriate comparison here would be the overtime Nunez would have earned at Hialeah, where he presumably would have remained over the relevant time period if he had not been sent back for wearing his union pullover, rather than in his normal location at the 2805 NW 75th Street facility. We accordingly clarify the make-whole remedy.

The judge did not address the complaint allegation that Portal threatened Nunez with unspecified reprisals on December 13. Nunez testified that, after Portal asked him why he was wearing his union pullover, Portal asked whether Nunez wanted to "continue the war." We credit Nunez' uncontroverted testimony.[18] We find that Portal's statement referring to "continu[ing] the war," made after Nunez was banished from Hialeah for wearing his union pullover and just before Portal unlawfully reassigned him to more onerous work, conveyed a threat of unspecified reprisals and violated Section 8(a)(1). *Parts Depot, Inc.,* 332 NLRB 670, 673–674 (2000) (question to openly prounion employee about his union support posed in tone that conveyed a threat of unspecified reprisal violated Sec. 8(a)(1)).

AMENDED CONCLUSIONS OF LAW

Substitute the following for paragraph 1.

[13] Specifically, the judge found that Rodriguez unlawfully told Huembes on the first day of her transfer to Hialeah that he was placing her away from the other employees because he did not want to hear her mentioning the Union. We agree with the judge, for the reasons stated by him, that this prohibition was unlawful.

[14] The judge dismissed as unsupported the allegation that Nunez was unlawfully denied overtime by virtue of his unlawful transfer. We affirm the judge's dismissal for the reasons he stated. We further find, in agreement with the judge, that this dismissal does not preclude a finding in compliance that Nunez is entitled to make-whole relief for any loss of hours as a result of his unlawful transfer from Hialeah to a more onerous work assignment.

[15] We agree with the judge's dismissal of the complaint allegation that, in making this statement, Rodriguez unlawfully threatened to deny employment opportunities to employees if they supported or assisted the Union.

Contrary to her colleagues, Member Liebman would find that Rodriguez' statements did constitute an unlawful threat to deny Nunez an employment opportunity. Rodriguez' offer to teach Nunez a new skill was contingent upon Nunez' ceasing any activity that might demonstrate to Rodriguez his support for the Union. Indeed, the following day, Rodriguez made good on his threat to deny work opportunities in response to manifestations of union support by cutting short Nunez' temporary assignment to Hialeah because Nunez came to work in a union pullover.

[16] Although it is not clear whether this reassignment lasted 1-1/2 days, as Portal testified, or 3 days, per Nunez, we find that difference immaterial. As the judge indicated, Portal's asserted reason for the assignment—that all the trucks were out on deliveries by the time Nunez returned—does not explain why the assignment was extended beyond the end of that day. In any case, the reassignment to more onerous work would not have occurred at all had Nunez not been removed from Hialeah for wearing his union pullover.

[17] This issue was not raised in the complaint, but in the General Counsel's posthearing brief. No party has excepted to the judge's rejection of the General Counsel's argument that the initial transfer to Hialeah was unlawful. Thus, that issue is not before us.

[18] The judge did not discredit Nunez' testimony. Portal was not specifically asked at the hearing whether he made the statement attributed to him by Nunez and so did not specifically deny it.

"1. By prohibiting prounion employees from speaking with their coworkers, by prohibiting employees from discussing the Union, by threatening prounion employees with unspecified reprisals, and by engaging in surveillance of employees' union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, RC Aluminum Industries, Inc., and RC Erectors, Inc., Miami, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(c), and reletter the subsequent paragraphs accordingly.

"(c) Threatening employees with unspecified reprisals because of their union activities."

2. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN BATTISTA, concurring in part and dissenting in part.

I concur with my colleagues on their findings of unfair labor practices, except as to the finding of an unlawful discharge of Alba Huembes. Contrary to my colleagues, I find that the General Counsel has failed to prove that Huembes was discharged.

1. The facts surrounding the cessation of Huembes' employment with the Respondent are in dispute.[1] According to Huembes, her supervisor (Rodriguez) called her into his office. Huembes testified that Rodriguez told her he was firing her because she "was uprising [sic] the people with the Union," and he could fire anybody "because I don't believe in the Union."

According to Rodriguez, Huembes approached him in his office during the lunch period and complained that another employee was bothering her (Huembes).[2] After Rodriguez stated to Huembes three times, "Alba, I don't know what I'm going to do with you anymore," Huembes announced that she was quitting.

Another employee, Jose Diaz, was present during the conversation between Huembes and Rodriguez. Diaz testified that Rodriguez told Huembes, "I don't know what I am going to do with you." After Rodriguez made that statement three times, Huembes said she was "leaving." When asked whether Rodriguez fired Huembes, Diaz testified, "[N]ot in my presence."

Lastly, the judge admitted into the record a copy of one of Huembes' final two paychecks, issued to her on her last day of work, upon which was written "Termination 11/16/00." Rodriguez testified that he did not know where the written notation came from. The Respondent objected that the check and notation had not been properly authenticated and that they constituted hearsay evidence. However, the judge admitted the check and notation into evidence.

Based on the evidence, I find that the General Counsel has failed to prove that Huembes was discharged. Although Huembes testified to that effect, Rodriguez, corroborated by Diaz, testified that Huembes quit. There is no demeanor-based credibility finding that resolves the conflict in favor of Huembes. Nor are there any other rational bases for crediting the one witness over the two others.[3] Thus, the General Counsel has failed to prove, by a preponderance of the evidence, that Huembes was discharged. *American, Inc.*, 342 NLRB 768, 768 (2004) (affirming dismissal of allegation because "the credibility of the General Counsel's witness did not preponderate over that of the Respondent's") (citing *Iron Mountain Forge Corp.*, 278 NLRB 255, 263 (1986).

My colleagues credit the testimony of Huembes because Rodriguez did not expressly deny her testimony and because the Respondent did not explain why Huembes would have quit. I disagree. First, Rodriguez implicitly denied Huembes' testimony when testifying to an entirely different version of their conversation. It is literally a "he said/she said" situation. There is no reason to discredit Rodriguez simply because, after testifying to a completely different series of statements, he did not also say that other statements contradicting his testimony were not said. Second, there is no basis for requiring the Respondent to expressly demonstrate why Huembes quit. Rodriguez testified that many employees quit work, and, thus, Huembes' quitting would not be unusual. In addition, Huembes' quitting is explained by the record evidence that Huembes had been bothered by another employee, and she was then accused of bothering others. Rodriguez said three times: "Alba, I don't know what I'm going to do with you anymore." In light of this, it is not surprising that an exasperated Huembes would quit.

In sum, there is nothing in Huembes' testimony to suggest that it is inherently more probable than the testimony of Rodriguez and Diaz. On the other side, Rodri-

[1] The presiding administrative law judge died after the hearing closed but before a decision issued, and the parties elected not to retry the case in front of the new judge. Accordingly, the credibility determinations of the judge are not based on demeanor.

[2] Another employee, Miguel Garzon, had previously complained to Rodriguez that Huembes had been bothering him.

[3] Indeed, since Huembes was an interested witness, this is at least one rational factor against his credibility.

guez' testimony was corroborated by Diaz, who confirmed that Rodriguez thrice told Huembes, "I don't know what I am going to do with you" after which Huembes quit.

The majority states that Diaz' statement, "not in my presence," suggests that he may not have been present for the entire conversation. This is complete speculation. According to Huembes, her employment ended in Rodriguez' office after she and Rodriguez spoke. Diaz and Rodriguez both testified to being at that meeting and that Huembes stated she was quitting. There is no reason to discredit Diaz' testimony.

I also find the check is insufficient to support a finding of a discharge. This document is inadmissible and it was error for the judge to admit it into evidence. Rodriguez could not authenticate the check or the writing on the check, and the General Counsel called no other witnesses to authenticate the check and writing. The General Counsel bears the burden of authenticating the evidence on which it relies, and failed to do so here. Thus, lacking authenticity, the checks and writing were improperly admitted. Fed.R.Evid. 803; *Marathon LeTourneau Co.*, 256 NLRB 350, 350 fn. 3 (1981), enfd. 699 F.2d 248 (5th Cir. 1983); *Longshoremen ILWU Local 19 (West Coast Container Services)*, 266 NLRB 193, 199 fn. 4 (1983).

My colleagues say that, under Board law, hearsay evidence is admissible if it is corroborated. They then go on to use Huembes testimony as the corroboration. That argument will not suffice. As discussed above, that testimony has not been shown to be credible. And, to say that the check and notation support credibility (so as to corroborate the check and notation) is an egregious example of circular reasoning.

Further, even assuming, arguendo, that the check and notation were properly admitted, it would nonetheless fail to demonstrate that Huembes was discharged. Neither party disputes that Huembes' employment ended on November 16, as the checks state. What is in dispute is whether that termination was voluntary or not. The presence of the handwritten word "termination" does little to answer this question. In sum, the check fails to establish that Huembes was *involuntarily* terminated.[4]

In sum, the General Counsel bears the burden of proving that Huembes was discharged, and the testimony of Huembes and the unauthenticated checks are insufficient to prove the case. Accordingly, I would not find that the Respondent discharged Huembes. *American, Inc.*, supra at 768.[5]

[4] My colleagues suggest that the word "quit" would have more clearly indicated a voluntary separation from employment. However, even if the word "quit" clearly means voluntary separation, it does not follow that "termination" clearly conveys the contrary. The term is ambiguous in regard to the issue of voluntary versus involuntary separation.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit those of you who support the Union from speaking with your coworkers, and WE WILL NOT prohibit you from speaking about the Union.

WE WILL NOT engage in surveillance of your union activities.

WE WILL NOT threaten employees with unspecified reprisals for engaging in union activities.

WE WILL NOT discharge, assign more onerous work to, transfer, or otherwise discriminate against any of you for supporting Local Union No. 272 and Shopmen's Local Union No. 698 of the International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, AFL–CIO, or any other union.

WE WILL NOT fail and refuse to notify and bargain with Local Union No. 272 and Shopman's Local Union No. 698 of the International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, AFL–CIO, before making changes in your terms and conditions of employment.

[5] Although I do not credit the testimony of Huembes, were I to do so and find the "discharge" violation, I would agree with Member Meisburg that Rodriguez' statement to Huembes was part of the res gestae of the discharge, and was not a separate violation of the Act. I also agree with Member Meisburg to affirm the judge's dismissal of the allegation that Rodriguez unlawfully threatened to deny employment opportunities to employees if they supported or assisted the Union. Finally, I agree with my colleagues that Angel Portal's "continue the war" statement violated the Act. In crediting Nunez testimony in this regard, I note that the statement is consistent with other unlawful conduct directed at Nunez.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Alba Huembes full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges enjoyed.

WE WILL make Alba Huembes whole for any loss of earnings and other benefits she suffered as a result of our discrimination against her, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Alba Huembes, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that we will not use the discharge against her in any way.

WE WILL make Pedro Nunez whole, with interest, for any loss of earnings that he may have suffered as a result of our discrimination against him.

WE WILL notify and bargain with the Union before making changes in your terms or conditions of employment. The appropriate bargaining unit is:

> All full-time and regular part-time production and maintenance employees and truck drivers employed by us at our facilities in Miami-Dade County, Florida, including the shipping clerk and the receiving clerk; but excluding purchasing clerks, estimators, draftsmen, secretaries, receptionists, accounting employees, personnel clerks, and all other office clerical employees, guards and supervisors as defined in the Act.

RC ALUMINUM INDUSTRIES, INC., AND RC ERECTORS, INC.

Shelly B. Plass, Esq., for the General Counsel.
Harry N. Turk, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Miami, Florida, on November 26, 27, and 28, 2001, before the late Administrative Law Judge Jerry M. Hermele.[1] The charge in Case 12–CA–21207 was filed on November 29, and was thereafter amended several times, the final and fifth amended charge was filed on June 28, 2001. The charge in Case 12–CA–21453 was filed on April 13, 2001. A consolidated complaint issued on July 31, 2001. The complaint, as amended at the hearing, alleges various violations of Section 8(a)(1) of the National Labor Relations Act (the Act), several violations of Section 8(a)(3) of the Act including the discharges of employees Alba Huembes and Roberto Espino and the assignment of more onerous work to employee Pedro Nunez, and a reduction in the work hours of unit employees and a grant of a wage increase to unit employees in violation of Section 8(a)(3) and (5) of the Act. Judge Hermele had not issued a decision in this case prior to his untimely death. On March 4, 2002, Chief Administrative Law Judge Robert A. Giannasi reassigned this case to me pursuant to Section 102.36 of the Board's Rules and Regulations. The parties have agreed not to try the case de novo. I find merit with regard to several of the 8(a)(1) allegations, the 8(a)(3) allegations relating to Huembes and Nunez, and the 8(a)(5) allegation relating to the wage increase.

On the entire record made before Judge Hermele,[2] and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, RC Aluminum Industries, Inc., and RC Erectors, Inc., the Company, are Florida corporations, engaged in the manufacture of windows, handrails, and doors at production facilities located in Dade County, Florida, and the installation of those products at various jobsites in the State of Florida. Although the Respondent's answer denies that RC Aluminum Industries, Inc., and RC Erectors, Inc., are affiliated businesses and constitute a single-integrated business enterprise, it admits that they annually purchase and receive goods valued in excess of $50,000 directly from points outside the State of Florida. In *RC Aluminum Industries*, 334 NLRB No. 64 (2001) (not reported in Board volumes), a test of certification case, the Board held that RC Aluminum Industries, Inc., and RC Erectors, Inc., constitute a single-integrated business enterprise and a single employer and that both individually and as a single employer are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Consistent with the Board's decision, I so find and conclude.

The Respondent admits, and I find and conclude, that Local Union No. 272 and Shopmen's Local Union No. 698 of the International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, AFL–CIO (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Company, in the year 2000, operated out of five facilities. Testimony at the hearing related to three of these facilities: the headquarters building located at 2805 N.W. 75th Street in Miami, a production facility located diagonally across the street at 2600 N.W. 75th Street, and a production facility in Hialeah, Florida. The headquarters building contained managers' offices, work areas for nonunit personnel including draftsmen, estimators, and sales employees, a production area where approximately 40 unit employees worked, and the shipping and

[1] All dates are in the year 2000, unless otherwise indicated.

[2] I grant the joint motion of the parties filed on December 13, 2001, to reopen the record and, in the absence of any objection, I receive GC Exh. 20 and close the record.

receiving department. The facility located at 2600 N.W. 75th Street provided production space in which approximately 40 unit employees assembled windows, chiefly for the Diplomat Hotel, the Company's major contract during the relevant period. The production facility in Hialeah is about 10 miles from the buildings on N.W. 75th Street.

The Company's operations are directed by President Raul Casares and Vice President Angel Mestres. At all relevant times, Angel Portal was the operations manager with day-to-day responsibility for production at the N.W. 75th Street facilities and shipping and receiving. Armando Rodriguez, supervisor of production, was responsible for the Hialeah facility. Portal and Rodriguez each reported directly to Vice President Mestres.

On July 21, a representation election was held in two separate units of the Company's employees, a unit of production and maintenance employees and a unit of installers. The employees in both units selected the Union as their collective-bargaining representative. On November 9, the Regional Director of Region 12 certified the Union in the two separate units. Following the certification, the Respondent refused to recognize and bargain with the Union. The Union filed charges and, in *RC Aluminum Industries,* 334 NLRB No. 64, slip op. 2 (2001) (not reported in Board volumes), decided on July 17, 2001, the Board held that the Respondent had violated Section 8(a)(5) of the Act. That case is presently pending before the Court of Appeals for the District of Columbia.

This case involves only the production and maintenance unit and, for the most part, relates to events occurring following the Union's election victory on July 21. The 8(a)(1) allegations in the complaint arise from statements allegedly made by Mestres, Portal, and Rodriguez at various times to alleged discriminatees Alba Huembes, Roberto Espino, and Pedro Nunez, and I shall, therefore, address those allegations in the context of my separate discussions of the Company's alleged discrimination against each of those employees. This decision shall then address the complaint allegations relating to a reduction of work hours and a general wage increase, both of which are alleged as 8(a)(3) and (5) violations.

B. Alba Huembes

1. Facts

Huembes worked for the Company from August 11, 1993, until November 16. In July, she was working at the production facility at 2600 N.W. 75th Street where she glued parts in assembly. Huembes participated in a union rally that was held outside the plant and in view of the headquarters building at 2805 N.W. 75th Street prior to the representation election. She wore a prounion T-shirt, and she was photographed by a security guard.

The Company has a past practice of granting no-interest loans to employees that are repaid by weekly deductions from their wages. Huembes had received loans for $300 to $400 on four or five occasions. Operations Manager Angel Portal testified without contradiction that he could not approve loans in excess of $500 and that loans to employees were generally between $200 and $300, but supervisors could receive $500.

On July 14, a week before the election, Huembes requested a loan in order to cover the cost of some dental work that she needed. Huembes says that she requested a $1000 loan; Portal says that she asked for $2000. Portal testified that, despite the $500 limitation, Huembes requested that he present her request to President Casares. As he expected, Casares denied the request. Portal testified that, when he informed Huembes of the denial, she responded by calling Casares an "asshole." Huembes testified that Portal informed her that she would receive the loan if she and her son, who was also an employee, would agree to be absent from work on Friday, July 21, the day of the election, and that she refused.

Portal speaks both English and Spanish and testified without an interpreter. Huembes speaks only Spanish and testified through an interpreter. When Huembes testified in rebuttal, she was asked whether she had called Casares an "asshole." The interpreter stated that the question could not be translated because there is no such word in Spanish. No evidence was presented to the contrary. Portal and Huembes agree that she requested a loan but that she did not receive the loan. The failure to grant the loan is not alleged as a violation of the Act. Huembes had previously received loans, all for less than $500. Although she admitted asking for $1000, I find it unlikely that Huembes would ask for a loan of $2000, an amount more than four times greater than she had previously received. In the absence of evidence contradicting the court interpreter's inability to translate the word "asshole," I do not credit Portal's attribution of that word to Huembes. Having discredited his testimony regarding the reply that Huembes made, I credit her testimony that she replied by declining Portal's offer of the loan since it was conditioned upon her agreeing to remain at home with her son on the day of the election.

During the week following the election, Huembes spoke with Vice President Mestres. Both agree that the conversation occurred in his office. According to Huembes, Mestres told her to come to his office where he asked her why she wanted to be involved with the Union. She testified that she replied that she wanted an increase in her salary, that she had asked Operations Manager Portal for a raise, and that Portal had replied that, if she did not like the salary she was earning, she could leave. Mestres asked why she had not come to him but then immediately stated that he could not give her a raise at that time, to wait to see "how the problem with the Union gets resolved; if not, ask the Union to give you a raise."

Mestres testified that Huembes approached him, asking for a raise. He recalls that he informed her that he could do nothing saying, "I cannot give you a raise, I cannot dismiss you, I cannot do anything . . . until we know the results of the election" and that then the Union would raise her salary through negotiations or "we'll raise your salary," referring to the Company. Given the fact that the election was over, Mestres would have no reason to seek out the reasons Huembes had supported the Union. Huembes had, some 10 days earlier, sought the loan from Portal. I credit Mestres that Huembes approached him and asked for a raise.

On the afternoon of Friday, July 21, the day of the election, Huembes and all other employees in the facility at 2600 N.W. 75th Street were told not to report on Saturday, that there would

be no more overtime. Huembes returned to work on Monday. She acknowledged that her work was "starting to decrease."

On September 5, Huembes was transferred to the Hialeah facility. She began work there on September 6. She acknowledges that, within a week or two of her transfer, several other employees were also transferred to that facility. Upon reporting to work, Huembes was directed to a worktable at the rear of the production floor, away from her coworkers. About an hour after she reported to work, Supervisor of Production Armando Rodriguez came to her work station and informed her that the location at which she had been placed "was going to be my workplace, that he didn't want to see me talking with . . . anybody around me, and that is why they had placed me there." He told her that he "didn't want the Union being mentioned." Rodriguez did not deny his placement of Huembes or the foregoing conversation.

Huembes continued working at the Hialeah facility from September 6 until November 16. During this period she testified that she was denied overtime whereas other employees received overtime. She named none of those employees. She rode to work with a fellow employee, Gabriel Mendez. When questioned whether she also rode home with Mendez, Huembes initially testified, "Yes, he would give me a ride." She then modified this answer, testifying that she would ride with him but that, in the afternoons, "sometimes I would not go with him." She did not testify that her not riding with Mendez in the afternoon occurred because he was working overtime whereas she was not.

On November 16, when he picked up Huembes, Mendez commented that Leadman Miguel Garzon had told him not to pick her up because doing so "was going to jeopardize" him, Mendez. On prior occasions, Mendez had informed Huembes that Garzon had said that because Huembes "belonged to the Union . . . [that she] was going to jeopardize him [Mendez] that way." Upon arriving at work, Huembes confronted Garzon, asking him what he had against her since she had done nothing to him and why he had told Mendez not to give her a ride, since Mendez' "vehicle is his vehicle and that vehicle doesn't belong to the company." Garzon responded that he was not the one saying it, that "it is Armando Rodriguez who does not want to see Gabriel [Mendez] giving you a ride, because he says that . . . [you are] from the Union."

Garzon acknowledges that he spoke to Mendez, cautioning him about having conversations with Huembes that interrupted his work. Garzon initially testified that, on the morning of November 16, Huembes walked up to him and called him a "maricon," which is translated into English as "faggot." Garzon testified that he reported Huembes' offensive conduct to Rodriguez. Upon further examination, Garzon testified that Huembes had confronted him, and told him that he was "stupid, because she wanted me to go on the side of the Union, and I told her that I didn't want to." Garzon states that Huembes persisted, telling him that the employees would have better benefits. He responded that he was "fine the way I was." Garzon placed the "maricon" comment at the beginning of this conversation. Regarding what he reported to Rodriguez, Garzon was asked, "When you went to Mr. Rodriguez, did you tell him what she was trying to convince you to do when she called you a maricon?" Garzon answered, "Correct."

Whether Garzon reported that Huembes was soliciting him to support the Union or that he had told Huembes that Rodriguez was seeking to interfere with her transportation to work because she was "from the Union" is of no significance. Whichever report Garzon made, it was directly related to Huembes' union activity.

At 12:20 p.m., Rodriguez called Huembes to his office. Leadman Jose Diaz was present, performing some work, but he said nothing. Rodriguez informed Huembes that "this is going to finish here already . . . because I already have your two checks being made. Because you are right here, you are uprising the people with the Union, [a]nd you know that with a Union or without the Union, I can fire people. And the Union, I just stick it up my ass. . . . [J]ust like I am firing you, I could fire anybody, because I don't believe in the Union." Rodriguez mentioned that Huembes had been handing out "papers," and she acknowledged that she had done so at lunch and on breaks. Rodriguez directed Huembes to punch her timecard and leave. She refused, stating that he was firing her so he could punch her timecard.

Rodriguez testified that he did not fire Huembes, that she approached him when he went to the shipping office during the lunch period and complained that Garzon was bothering her. He responded by saying, three times, "Alba, I don't know what I'm going to do with you anymore." After his third repetition, he testified that Huembes stated that she was quitting.

Diaz, in somewhat confusing testimony, testified that Huembes initiated the conversation by stating her version of a conversation with Garzon. When asked what Huembes had purportedly told Rodriguez, Diaz testified that he did not "remember exactly, [I]t was a long time ago" but that Huembes "was trying to make Miguel [Garzon] responsible for it." He testified that Rodriguez told Huembes that he did not know what he was going to do with her, and Huembes stated, "I'm going to leave right away."

Documents bearing copies of the final two paychecks issued to Huembes, one for her regular pay and one for accrued vacation, show the withholdings from each check in handwriting beneath the copy of the checks. On both checks, after the total of the withholdings, appears the following: "Termination 11/16/00."

In mid-December, Portal testified that Rodriguez called him and advised that Nunez, whom Portal had sent to the Hialeah facility, was wearing a union pullover and that he, Rodriguez, "did not want him working there because he didn't want to create any problems."

The General Counsel presented Huembes as a rebuttal witness. As already noted, the interpreter was unable to translate the word that Portal had attributed to her. Huembes denied calling Garzon a maricon. Whether she did is immaterial since Rodriguez did not discipline Huembes for allegedly calling Garzon a maricon. Huembes repeated her testimony that she asked Portal for a $1000 loan, not a $2000 loan.

2. Analysis and concluding findings

The Respondent, at the hearing, moved for dismissal of paragraph 6 and subparagraphs 7(a) and (b) of the complaint arguing that they are barred by Section 10(b) of the Act. Subparagraph 7(a) alleges interrogation by Mestres and subparagraph 7(b) alleges a threat not to grant a wage increase. I have credited the testimony of Mestres that Huembes approached him and asked for a wage increase. Neither the statement that Huembes attributed to Mestres, to ask the Union for a raise, nor the response that he recalls giving, that the Union would raise her salary through negotiations or "we'll raise your salary," threaten denial of a wage increase. There is no complaint allegation relating to a promise of a wage increase. Insofar as neither of the allegations in subparagraphs 7(a) and (b) are established by credible evidence, I need not address whether they are barred by Section 10(b).

I have found that Portal did condition a loan to Huembes upon her not voting in the election. This incident preceded the election. Portal's offer to Huembes was an attempt to affect the outcome of the election. Her alleged discharge from the Hialeah facility by Rodriguez occurred almost 3 months after the election. There is no evidence connecting the incident involving Operations Manager Portal with the alleged discharge by Rodriguez. Portal's conduct constituted attempted interference with the election process. That allegation, unrelated to the allegation that the Respondent discharged Huembes in violation of Section 8(a)(3), is alleged for the first time in the fourth amended charge filed on March 30, 2001, more than 8 months after the incident occurred. The incidents were "separate and distinct acts carried out at different times, for different reasons." *Carpenters Local 720 (Stone & Webster)*, 274 NLRB 1506, 1507 (1985). I find that paragraph 6 of the complaint is barred by Section 10(b) and shall, therefore, recommend that it be dismissed. The incident does reveal animus towards the Union.

I shall address the evidence relating to the reduction in work hours in section E, below.

The complaint alleges that Rodriguez informed employees that they could not discuss the union and restricted employees to their work areas to prevent them from discussing the Union. Rodriguez did not deny that he informed Huembes that the location at which she had been placed "was going to be my workplace, that he didn't want to see me talking with . . . anybody around me, and that is why they had placed me there" and that he "didn't want the Union being mentioned." The Respondent presented no evidence of any prohibition restricting conversation among employees. The prohibition regarding speaking with coworkers or mentioning the Union, stated by Rodriguez, was not restricted to solicitation during working time. By informing Huembes that she was not to speak with anyone around her or to mention the Union, the Respondent interfered with employees' exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

The complaint alleges that Rodriguez threatened an employee with discharge on November 16. There is no evidence of any threat. As hereinafter discussed, I find that Huembes was unlawfully discharged. I shall recommend that this allegation be dismissed.

The complaint alleges that the Respondent discharged Huembes because of her union activity. In assessing the evidence regarding this allegation under the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), I find that Huembes did engage in union activity and that the Respondent was fully aware of her prounion sentiments. The undenied conversation in which Rodriguez directed Huembes not to mention the Union confirms the animus of the Respondent towards employee union activity. I find that the General Counsel has carried the burden of proving that union activity was a substantial and motivating factor for Respondent's action. *Manno Electric*, 321 NLRB 278 (1996).

The Respondent does not contend that Huembes engaged in conduct warranting discharge even in the absence of union activity. It contends that she quit. Huembes testified that she was fired. Garzon's testimony, which is not mentioned in the Respondent's brief, admits that he reported to Rodriguez that Huembes had accused him, Garzon, of being stupid for not supporting the Union, that with the Union the employees would have better benefits. Portal's testimony reveals that, in December, Rodriguez was unwilling to permit a driver wearing a prounion pullover shirt to work at the Hialeah facility. The Respondent's own document notes Huembes' separation as "Termination," not "quit." The Respondent presented no explanation for the designation "Termination" on its own documents. I do not credit the testimony of Rodriguez and Diaz that Huembes stated that she quit or was leaving. Rodriguez did not tolerate union activity at the Hialeah facility. One month after ridding the Hialeah facility of Huembes, Rodriguez prohibited active union adherent Nunez from working there. The Respondent has not rebutted the General Counsel's prima facie case. The probative evidence establishes that Huembes' union activity was the motivating factor for Respondent's action. By discharging Alba Huembes because of her union activity, the Respondent violated Section 8(a)(3) of the Act.

C. Roberto Espino

Espino worked at the Company for 11 years. At the time of his termination on November 17, he was the shipping and receiving clerk at the building located at 2805 N.W. 75th Street. Espino became involved in the organizational campaign well before the election. In May, Espino had been called into an office where President Casares and Vice President Mestres asked if he was involved with the Union, noting that they had received reports of his involvement including pictures of him at a union meeting. There are no allegations relating to this meeting, which occurred well outside the 10(b) period. Espino testified that he said nothing in that meeting. The Company was clearly aware that Espino supported the Union since he served as an observer for the Union on the day of the representation election.

Espino testified that prior to the election he had regularly worked 25 hours or more of overtime a week but that overtime ceased for him and "more than half the plant," including the employees who worked with him and the drivers, after the election. Espino's pay records do not support this testimony. The pay records reflect that Espino did regularly work overtime in excess of 25 hours a week in January, February, and early

March, but his overtime fell to an average of less than 20 hours a week from mid-March through June. In the 4 weeks preceding the election, Espino worked 39.75 hours of overtime, an approximate average of 10 hours a week. In the 4 weeks following the election, Espino worked 34.75 hours of overtime, an approximate average of 8-1/2 hours a week.

On November 12 or 13, Espino discovered that his personal cellular telephone needed charging so he began charging it in his office, plugging the charger into an electrical receptacle. A short time late, Espino discovered that his cellular telephone was missing. He asked and learned that Vice President Mestres had taken it. He went to Mestres who told him that he was "stealing electricity." Mestres handed the telephone to Espino who testified that the cellular telephone was on and that it was displaying the name and number of the last person that he had spoken with on that telephone, Union Representative Gregory Cisneros. Upon noticing this, Espino questioned what Mestres was looking for and Mestres responded that "he already found the phone that he was looking for."

Mestres admits confiscating the telephone, which he testified was on a table. When taking it, he stated to a couple of engineers, "this is not allowed in the shop." Mestres denied that he turned on Espino's cellular telephone. He testified that when Espino came to retrieve the telephone he told him, "Please, do not plug it into my power."

Espino testified that the cellular telephone was being charged in his office, and I find it incredible that he would have placed the telephone outside of his office. Thus, accepting the testimony of Mestres that the telephone was on a table, I find that it was on a table in Espino's office. Regarding Mestres assertion that "this is not allowed in the shop," the only written policy published by the Company relating to cellular telephones is dated September 27 and prohibits their use except during breaks and at lunch. Espino was not using the telephone. There is no written policy or testimony regarding oral promulgation to employees of any prohibition regarding the use of personal electrical devices such as radios, fans, or space heaters.

On the following morning, Espino testified that he discovered that the locks in the shipping and receiving department had been changed, including the locks to the gates through which the company trucks entered and left the property as well as the locks to the office, including his office. When the truckdrivers tried "to get the trucks out," they discovered that the gates were locked. Espino tried to open the gates, but he was unable to do so because there "were different locks from the ones that were there before." According to Espino, the security guard who lived on the premises, Silvio Leon, had keys to the new locks and opened the gates for the drivers. Espino testified that Operations Manager Portal opened his office for him. Portal denied that the locks were changed. Neither Leon nor any truckdriver was called by either party to corroborate Espino or Portal.

The next day, or the day thereafter, according to Espino, Portal "removed [the gasoline credit cards] from all the drivers." The Company had six gasoline credit cards that the truckdrivers used to fuel the trucks they drove. Espino testified that Portal kept two of the cards at all times and would give him four cards to give to the drivers. The drivers would return the cards to Espino and "[I]f Angel [Portal] weren't there I would keep them." Espino testified that, when he did this, he kept the cards locked in his office. Notwithstanding the description of the foregoing protocol, on the day in question, Espino testified that Portal removed the cards "from all the drivers" and "he even took away the one I had, also."

Portal testified that, about 3 weeks before Espino was dismissed, he was unable to account for one of the gas cards. Espino reported that it had not been returned to him, but the driver said he had returned it to Espino. Upon reviewing the gas receipts for that card, Portal noted that Espino's signature appeared upon several of them. He did not speak with Espino, but reported the situation to his superior, Mestres. Prior irregularities regarding the gasoline credit cards had consisted of lost cards, lost tickets, and the recording of incorrect information.

Mestres was occupied with other matters when he received Portal's report. When he addressed the gas card situation, he noted that the receipts showed that Espino had signed for premium gas, purportedly for Ford F-150 pickup trucks, without following standard procedure by recording the mileage of the trucks. More disturbing was the fact that it appeared that gasoline was being purchased at "times out of the ordinary." Mestres requested that a clerical obtain Espino's timecards for the relevant dates.

On November 17, about 2:30 p.m., Vice President Mestres called Espino to his office. According to Espino. Mestres gave him his regular check, a check for his vacation pay, and another check for $2000 "for the time I had worked there." Mestres then told him that he "could not continue working with them . . . because they had a lot of problems with me regarding the Union . . . that he didn't know why I had gone on the side of the Union." Espino testified that Mestres then stated that "we could not believe it" since Espino had worked for the Company so long. Espino denied that anything was mentioned regarding gasoline credit cards, that he was accused of using the company card to fill up his car with premium gas, or that he admitted doing so. He testified that he cut the check for $2000 into two pieces and placed it on Mestres' desk stating that he did not want it.

Contrary to Espino's version of the discharge interview, Mestres testified that, after he discovered the various purchases for which Espino had signed when not on the timeclock, he called Espino into his office. He showed him the gas tickets and the times gas was purchased. He asked if the signature was his, and Espino stated that it was. He then asked if Espino had any explanation. Espino stated, "No, I do not," and he then stated that he knew that "sooner or later I was going to get caught." Mestres then told Espino, "I have two choices, I either prosecute you or I dismiss you. I'm going to take the option to dismiss you. . . . [G]o home." Mestres denied giving Espino three checks.

The following table, which I have prepared from Respondent's Exhibits 5, 6, and 7, summarizes the relevant dates and times (to the nearest minute) reflected upon the gasoline receipts. Each receipt reflects that Espino purportedly purchased gas for a Ford F-150 pickup truck, but no mileage for the truck is shown. The "work time" entry is from Espino's timecard.

Date of Purchase	*Time of Purchase*	*Work time*	*Amount of Purchase*
June 24	12:23 p.m.	12 noon. (left)	$25.00
July 11	7:58 p.m.	6:30 p.m. (left)	27.88
July 31	3:46 p.m.	3:30 p.m. (left)	32.00
August 25	3:41 p.m.	3:30 p.m.(left)	28.00
September 2	6:50 a.m.	6:57 a.m. (arrived)	20.00
September 22	5:02 p.m.	12 noon (left)	24.00
Total			$156.88

Although counsel for the General Counsel recalled Huembes to deny using the language attributed to her by Portal and Rodriguez, Espino was not recalled either to deny that he was confronted with the documents that Mestres testified he presented to him or to provide any explanation for the purchases shown to have been made before and after his workdays.

Analysis and Concluding Findings

The complaint alleges that Mestres engaged in surveillance by "scrolling though the memory" of Espino's cellular telephone and threatening employees with discharge for engaging in union activities on November 17. It further alleges that the Respondent "denied Roberto Espino access to his work areas" and discharged him in violation of Section 8(a)(3) of the Act.

Regarding the cellular telephone, if, as he testified, Mestres' only concern had been the theft of electricity, he could have simply unplugged the charger. If he needed to confiscate some item in order to get Espino's attention, he could have confiscated the charger. The confiscation of Espino's personal property from his office suggests a different concern. Espino testified that the display on the telephone was activated, and I credit that testimony. The Union had been certified on November 9, and Espino had been a union observer at the election. The fact that the display was activated when Espino retrieved the telephones confirms that the Respondent was interested in whom Espino had been in touch with recently. By confiscating and activating the display on the cellular telephone, the Respondent engaged in surveillance of employees' union activities in violation of Section 8(a)(1) of the Act.

Although the complaint alleges that Espino was denied access to his work area, Espino admitted that Portal opened his office for him. At best, he was denied unsupervised access to his work area. Espino testified that, when the truckdrivers tried "to get the trucks out," he went to unlock the gates and discovered "different locks from the ones that were there before." Portal denied that the locks were changed in November. Although the General Counsel presented truckdriver Nunez as a witness, he was not questioned regarding being locked in because of the changed locks in November. Neither party called Silvio Leon, the security person who actually lives on the premises. Thus, I am left with a one-on-one credibility resolution between Espino who testified that the locks were changed and Portal who testified that they were not. Since I did not conduct this hearing, I can make no evaluation on the basis of demeanor. In circumstances such as this, there is no basis upon which I can give more or less weight to the testimony of Espino or Portal. See *National Telephone Directory Corp.*, 319 NLRB 420, 422 (1995). I therefore give them equal weight, and I find that the General Counsel has not established by the greater weight of the evidence that the locks were changed. Accordingly, I recommend that the allegation relating to denial of access be dismissed.

The complaint alleges that Mestres threatened an employee with discharge on November 17. There is no evidence of any threat. As hereinafter discussed, I find that Espino was lawfully discharged. I shall recommend that this allegation be dismissed.

The General Counsel established that the Respondent had been aware since May that Espino was engaging in union activities, and it bore animus towards employees who engaged in union activity. The Board, in *Roure Bertrand Dupont*, 271 NLRB 443 (1984), notes that, under *Wright Line*, supra, although the burden shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct," the employer cannot "simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." Id. In the instant case, the General Counsel's case was predicated upon the testimony of Espino that Mestres terminated him because of "problems with me [Espino] regarding the Union." The Respondent presented a legitimate reason for Espino's termination, misuse of gasoline credit cards. At that point in the proceeding, the General Counsel, from a trial strategy standpoint, could have recalled Espino to deny that he was presented with the documents and/or presented evidence that Espino was treated disparately or let the record stand. The General Counsel chose the latter option.

Counsel for the General Counsel, in her brief, argues that the Respondent presented no evidence that employees had been discharged for "the same or equally serious infraction[s]," and that it relied upon "an imaginary gas card policy." The gas card policy was not "imaginary." Employees were given gas cards to fuel company vehicles and, when doing so, recorded the mileage of the vehicle they were fueling and returned the cards to Espino. Although Espino monitored the use of four credit cards, giving them to the drivers and then receiving them back, he acknowledged that he would then either give the cards to Portal or, in Portal's absence, lock them in his office.

Although the General Counsel argues that the Respondent presented no evidence that employees had been discharged for "the same or equally serious infraction[s]," the General Counsel presented no evidence that employees had not been discharged for such conduct. Portal's testimony of prior problems regarding use of the credit cards related to lost cards and tickets and improper recording, not theft. So far as this record shows, the situation involving Espino, the interim custodian of the cards, was unprecedented.

I do not credit Espino's general denial in his direct examination that, when he was terminated, nothing was mentioned regarding misuse of gasoline credit cards and that he did not admit doing so. His general denial is of little or no probative value

in view of the testimony of Mestres, corroborated by documentary evidence, that Espino had misused a credit card. Espino's testimony that Portal "even took away the one I had, also," suggests that he had appropriated one of the cards to his own use. Confirmation that he had in fact done so is established by the testimony of Mestres that, when confronted with the tickets, Espino confessed. The failure of Espino to testify in rebuttal and to deny that he was confronted with the documents or to deny that, when confronted with the documents, he stated that he knew he was "going to get caught," preclude any reliance upon his general denials. See *Jo-Del, Inc.*, 324 NLRB 1239, 1443 fn. 21 (1997). I find, consistent with the credible testimony of Mestres, that Espino, when confronted with the gasoline purchase receipts, admitted that he realized that "sooner or later" he was going to be caught.

Espino's testimony that Portal assumed custody of the credit cards at or about the time of his termination confirms that the Respondent was concerned about their use. Documentary evidence establishes more than $150 in gasoline purchases purportedly for Ford F-150 trucks when Espino was not on the clock. Espino had no explanation for those purchases. When he acknowledged to Mestres that he knew he was going to be caught, Espino did not argue that the Respondent had ever tolerated such conduct. There is no evidence that the Respondent had previously encountered a situation where an employee had charged the company credit card with more than $150 in unexplained gasoline purchases. When questioned about any prior problems, Portal explained that if you "keep a tight rein, you don't have to worry about those things." Espino was the employee responsible for holding the reins. Mestres informed Espino that he could prosecute him or dismiss him and that he was taking the option of dismissing him, "[G]o home." Although the Respondent has no document setting out offenses that are punishable by termination, the absence of codified procedures is not controlling. With regard to stealing, "[i]t is a matter of common knowledge that employers do discharge for such conduct." *Boland Marine & Mfg. Co.*, 280 NLRB 454, 463 (1986).

The Respondent's evidence establishes not only that it had a legitimate reason for terminating Espino, but also persuades that the same action would have taken place in the absence of any union activity on his part. I shall recommend that the allegation that the Respondent unlawfully discharged Espino because of his union activity be dismissed.

D. Pedro Nunez

1. Facts

The complaint alleges that, on December 11, Portal interrogated an employee, made a statement relating to futility, and threatened an employee with unspecified reprisals in violation of Section 8(a)(1) of the Act. The foregoing allegations are predicated upon a conversation between Nunez and Portal in early December after Nunez was appointed as a union steward. The conversation occurred in a hallway near the shipping and receiving office. According to Nunez, Portal initiated the conversation by informing Portal that, if he continued to support the Union, he would have "to wait at least four years in order to earn $17 per hour." Nunez responded that he did not care that he would have to wait 4 years because, with "him," an apparent reference to Portal and the Company, he would earn only $1 more since "what he gives is just an increase of 25-cents per year." At this point, Nunez recalls that Portal said, "[O]kay, now I know what I have to do with you."

Portal agrees that he had a conversation in which $17 an hour was mentioned. He recalls that Nunez stated to him that he would soon "be making $17 an hour." Portal responded by saying that "the money . . . would be between the Union and RC [the Company], not between me and him." Portal denied stating that he knew what he had to do with Nunez.

If Nunez had testified to a prior conversation, or to a longer conversation, with Portal, there would be some logical context in which I would be able to evaluate Portal's alleged remarks. The Company had refused to bargain with the Union, and Kevin Wallace, district representative of the Union, testified that there have been no contract negotiations. There is no evidence that the Union had submitted any proposal that included a pay scale providing immediate or incremental raises over a 4-year period to $17 an hour for drivers. In order to credit Nunez, I must find that Portal's $17 figure was simply plucked from thin air because Nunez testified to only one conversation and, in his version of the conversation, the $17 figure was first mentioned by Portal. Portal's testimony is logically consistent. Nunez mentioned the $17 figure, and Portal responded that wages were an issue between the Company and the Union. I credit Portal. There is no evidence of any interrogation. Portal's response contained no threat of futility or unspecified reprisals. I shall recommend that these allegations be dismissed.

At the end of the next workday, Portal directed Nunez to report to the Hialeah plant, to make deliveries from there. Portal testified that he selected Nunez because he was "one of our better drivers" and had the most seniority. Nunez testified that he worked at Hialeah for 2 days and a portion of a third day. When at the Hialeah facility, the manager, who Nunez initially called Armando Guitierrez, told him that, if he wanted to continue working at the Hialeah facility, he could teach him how to assemble a window but "he didn't want to know anything about the Union." In later testimony, Nunez confirmed that Guitierrez and Rodriguez were "the same person." The foregoing is alleged as a threat to deny work opportunities to employees if they supported or assisted the Union. Unlike the direction to Huembes, Nunez was not told not to mention the Union. Nunez's testimony establishes only that the manager, Rodriguez, stated that he did not want to know anything about the Union. This stated desire to remain ignorant did not constitute a threat.

On his third day at Hialeah, Nunez wore a union T-shirt to work. After he made his second delivery, Rodriguez directed him to report to Portal who had "a very special job" for him.

Although it is of little importance, Portal disagrees that Portal worked at Hialeah for 3 days. He testified that Rodriguez called him on the very first morning that Nunez reported to the Hialeah facility and stated that "this gentleman [Nunez] had a Union pullover on and that he did not want him working there because he didn't want to create any problems." Portal told Rodriguez to send Nunez back to report to him.

Nunez reported to Portal who informed him that he had "a little job" for him. He took him to the building at 2600 N.W.

75th Street and assigned Nunez the task of breaking down wooden boxes, a task Nunez testified that he performed for 3 days. Portal admits the job assignment, but asserts it was only for "a day and a half at the most." Nunez described this task as very hard work, "a job for a beast." I do not credit Portal's testimony that the job was "very easy." He acknowledged that the tools needed for this job included a crowbar. The job was completed by other employees, including shipping employees and janitors, not truckdrivers.

2. Analysis and concluding findings

The complaint alleges, inter alia, that the Respondent violated Section 8(a)(3) by transferring Nunez "from his previous work location" and by assigning him more onerous work. I find that the assignment of Nunez to the task of breaking up boxes constituted more onerous work. This assignment, which constituted a transfer of Nunez' work location, followed Rodriguez' refusal to permit Nunez to work at Hialeah specifically because he was wearing a prounion pullover. The General Counsel has established a prima facie case of discrimination in violation of Section 8(a)(3) of the Act. The Respondent has not rebutted the General Counsel's case. Portal testified to a nondiscriminatory rationale for assigning Nunez to Hialeah: he was one of the Respondent's better drivers and he had the most seniority. Had this same rationale been applied when Nunez returned from the Hialeah facility, he would have been returned to his driving duties the morning after his return. The Respondent, by transferring Nunez from his regular job duties and assigning him more onerous job duties because of his union activities violated Section 8(a)(3) of the Act.

Counsel for the General Counsel, in her brief, argues that the transfer of Nunez *to* the Hialeah facility violated the Act; however there is no such allegation in the complaint. Since this transfer, like the transfer to the more onerous work at the building located at 2600 N.W. 75th Street, would constitute a transfer "*from* his previous work location," the remedy remains the same and any additional finding would be cumulative.

The complaint also alleges that the Respondent violated Section 8(a)(3) by changing Nunez' permanent work duties and reducing his work hours. The allegation of changed work duties is subsumed in the more onerous work allegation. Regarding the alleged reduction in work hours, the record reflects that Nunez worked 12 hours of overtime in the pay period ending on December 6 and 3.5 hours of overtime during the pay period ending December 13, the week that he was assigned the more onerous work. There is no evidence showing that Nunez would have received more than 3.5 hours of overtime if he had continued to drive from his normal work location. Thus there is insufficient evidence upon which to base a finding that Nunez' hours were discriminatorily reduced. I shall, therefore, recommend that these allegations be dismissed. Notwithstanding the foregoing, in view of my findings of unlawful discrimination against Nunez, I shall order an appropriate make whole remedy.

E. The Reduction in Work Hours

1. Facts

Late in the afternoon of Friday, July 21, the day the election had been held, employees working in the building at 2600 N.W. 75th Street were told not to report on Saturday, to return on Monday, that there would be no more overtime. Although employee Jorge Piedra testified that there were "certain things" that still needed to be done with regard to the Diplomat Hotel job, his testimony does not establish that there was sufficient work to justify overtime for the 30 employees that he recalls were working in the building at the time. Beginning in September, employees were transferred to other locations, including Huembes, who was transferred to Hialeah, and Piedra, who was transferred to the building at 2805 N.W. 75th Street. Although Piedra testified that he was not initially assigned overtime at his new work location, he did not identify any employees who were assigned overtime and he acknowledged that, when Mestres "needed some jobs to be done," he was assigned overtime. Piedra had demonstrated his support for the Union at rallies and was appointed a union steward.

Vice President Mestres explained that the Company obtained a 3-year lease on the building at 2600 75th Street to provide the necessary space for assembly of windows for the Diplomat Hotel, the Company's major contract during this period. Production was at its height during the first few months of the year 2000. In July, the Company's normal production was sufficient to supply the Diplomat Hotel job, and overtime was not needed. Despite this, Mestres continued to assign overtime because counsel had advised that the Company should "not alter anything, . . . just keep the scenario the same. Even though you don't need overtime, you keep the overtime . . . in order not to alter the result of the election." After the election, the Company took the action "long needed before the elections" and "stopped the overtime." In September, employees were laid off in accord with seniority and transferred.

There are no unfair labor practice allegations relating to the layoff and transfer of employees in September. Although the initial charge in Case 12–CA–21207 alleged the layoffs as an unfair labor practice, this allegation was deleted when the third amended charge was filed on March 5, 2001.

There is no probative evidence contradicting Mestres that the production work, as opposed to the installation work, relating to the Diplomat Hotel contract did not require overtime as of July. Counsel for the General Counsel, in her brief, argues that the Respondent presented no "documentation showing the projected schedule" for completion of the project and that, therefore, an adverse inference must be drawn. I disagree. The General Counsel had the opportunity to contradict the testimony of Mestres by establishing internal inconsistencies in his testimony, by independent witnesses, or by documents obtained by subpoena. The testimony of discriminatee Huembes, that shortly before her transfer to Hialeah she had nothing to do, confirms that the production work had declined. The transfers of senior employees to other locations and the layoffs of junior employees, actions not alleged as unfair labor practices, further corroborate the testimony of Mestres.

Counsel for the General Counsel, in her brief, refers to the overtime records of 21 employees "offered as a sampling" in support of the allegation that the reduction in work hours violated Section 8(a)(3) of the Act. Neither the sample nor the General Counsel identifies the facilities at which the employees in the sample worked or the jobs that they performed. Counsel

identifies various groups of employees in the sample including those who received no overtime after July and those who began receiving some overtime after several weeks. The only employees in the sample identified as prounion are Huembes and Piedra. Although Huembes received no overtime after July, the overtime record of employee Mendez, who also worked at the Hialeah facility and with whom Huembes rode to work, is not included in the sample. Prounion employee Piedra is included in the group of employees whose overtime was restored.

2. Analysis and concluding findings

The complaint alleges that the Respondent, on or about July 21, reduced the work hours of unit employees, including Espino, Alexis Avendano, Piedra, Jose Clavijo, Huembes, and Franciso Cespedes because the named employees supported the Union and to discourage employees from engaging in these activities. There is no evidence establishing the union sentiment of Avendano or Clavijo. Cespedes ceased working for the Respondent in September. The Respondent acknowledges eliminating all overtime in the facility located at 2600 N.W. 75th Street after July 21. I have credited the testimony of Vice Preside Mestres that this action was dictated by the absence of a need for more production and that the only reason overtime was not eliminated sooner was to avoid any appearance of interference with the election. Espino continued to receive overtime after July 21. Although there were some weeks after mid-September that he did not receive overtime, in each of those weeks Espino worked less than 40 hours of regular time. Piedra acknowledged that when Mestres "needed some jobs to be done" that he was assigned overtime. Piedra was working at the 2803 N.W. 75th Street facility. Huembes was not assigned overtime, but there is no evidence that any other employees performing the job to which she was assigned at the Hialeah facility were assigned overtime. In short, there is no evidence establishing a pattern of discrimination with regard to the assignment of overtime to known union adherents. I shall recommend that the 8(a)(3) aspect of this allegation be dismissed.

An employer is not obligated to bargain with a union regarding a decision made prior to the beginning of its bargaining obligation. When, as in the instant case, the employer has "determined well before the election to work unit employees through the election irrespective of actual work requirements and then to effect . . . layoffs to bring staffing levels . . . into conformity with production needs," the failure of the employer to notify the union does not violate Section 8(a)(5) of the Act. *Consolidated Printers*, 305 NLRB 1061, 1067 (1992); see also *Tocco, Inc.*, 323 NLRB 480 fn. 2 (1997). In the instant case, the Respondent had determined prior to the election that overtime was no longer necessary to meet its production demands. Despite this, it continued to assign overtime up until the time of the election in order to avoid any appearance of interference. The elimination of overtime contemporaneously with the conclusion of the election was effectuation of an economic decision made well before the Respondent had an obligation to bargain with the Union. I shall recommend that the 8(a)(5) aspect of the allegation relating to reduction of work hours be dismissed.

F. The Wage Increase

The complaint alleges that the Respondent granted a wage increase on March 22, 2001. The Respondent stipulated that a wage increase was granted to all plant employees in the spring of 2001. Kevin Wallace, district representative of the Union, testified that there was no notice to or bargaining with the Union regarding the increase, that the Respondent is challenging the Union's certification and there have been no contract negotiations.

The General Counsel argues that the wage increase discouraged support for the Union in violation of Section 8(a)(3) of the Act by demonstrating that increases could be "achieved without assistance from the Union." No pertinent case authority is cited for this proposition. In *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339 (2000), the only case cited by the General Counsel, the increases granted to specific employees preceded an election that was not held because "unfair labor practice intervened." No evidence of any communications with employees relating to the wage increase or to the Union with regard to the wage increase was offered. In the absence of any such evidence, I can find only that the Respondent acted in derogation of its bargaining obligation. I shall recommend that the 8(a)(3) aspect of this allegation be dismissed.

An employer's bargaining obligation begins upon demonstration of a union's majority status. Although an employer may challenge a union's election victory by refusing to bargain and testing the union's certification, any unilateral changes made during that period are made "at its peril" unless there are compelling economic considerations for doing so. *Mike O'Connor Chevrolet*, 209 NLRB 701 (1973). Although the Respondent has challenged the certification of the Union, its unilateral action relating to employee wages, a mandatory subject of bargaining, was taken after the Union's election victory and certification on November 9. The Respondent presented no evidence that the increase was given pursuant to past practice or compelling economic circumstances. In granting a general wage increase to unit employees without notice to or bargaining with the Union, the Respondent violated Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. By prohibiting prounion employees from speaking with their coworkers, by prohibiting employees from discussing the Union, and by engaging in surveillance of employees' union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By transferring employees, assigning more onerous work to employees, and discharging employees because of their union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. By unilaterally increasing employee wages without notice to or bargaining with Local Union No, 272 and Shopmen's Local Union No. 698 of the International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, AFL–CIO, the Respondent has engaged in unfair labor prac-

tices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Alba Huembes, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent, in assigning Pedro Nunez more onerous duties, assigned him from his normal truck driving duties. Although the evidence is insufficient to support a finding that the Respondent's action deprived Nunez of overtime earnings, review of appropriate records at the compliance stage of this proceeding will reflect whether Nunez was deprived of overtime earnings. If so, the Respondent must make him whole for the loss of those earning, if any, plus interest as computed in *New Horizons for the Retarded*, supra.

The Respondent will also be ordered to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, RC Aluminum Industries, Inc., and RC Erectors, Inc., Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting prounion employees from speaking to other employees or from mentioning the Union.

(b) Engaging in surveillance of employee union activities.

(c) Discharging, assigning more onerous work to, transferring, or otherwise discriminating against any employee for supporting Local Union No. 272 and Shopmen's Local Union No. 698 of the International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, AFL–CIO, or any other union.

(d) Failing and refusing to notify and bargain with the Union before making changes in the terms and conditions of employment of unit employees.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify and bargain with Local Union No. 272 and Shopmen's Local Union No. 698 of the International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, AFL–CIO as the exclusive representative of unit employees before making changes in the terms and condition of those employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees and truck drivers employed by the Employer at its facilities in Miami-Dade County, Florida, including the shipping clerk and the receiving clerk; but excluding purchasing clerks, estimators, draftsmen, secretaries, receptionists, accounting employees, personnel clerks, and all other office clerical employees, guards and supervisors as defined in the Act.

(b) Within 14 days from the date of this Order, offer Alba Huembes full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(c) Make Alba Huembes whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Alba Huembes and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

(e) Make Pedro Nunez whole for any loss of earnings he may have suffered as a result of the discrimination against him as set forth in the remedy section of the decision.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facilities in Dade County, Florida, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility in-

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

volved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 6, 2000.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply

IT IS FURTJHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.